

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1171

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1171

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CODELL GRIFFIN,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

THE HONORABLE WHITMAN KNAPP, DISTRICT JUDGE

BRIEF FOR APPELLANT

BELL, MCSORLEY, HUDSON & DANIEL, P.C.
BY: EDWARD F. BELL (P 10652)
Attorneys for Appellant GRIFFIN
Suite 840 - Buhl Building
Detroit, Michigan 48226
(313) 393-0900

ON THE BRIEF: RONALD A MOLTER (P 25463)

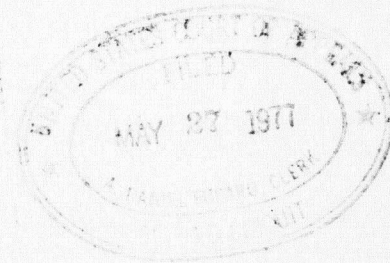


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1171

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CODELL GRIFFIN,

Defendant-Appellant.

ISSUES FOR REVIEW

I

WHETHER THE TESTIMONY OF THE INFORMANTS SHOULD HAVE BEEN EXCLUDED AND THE CONVICTIONS OF APPELLANT REVERSED BECAUSE THE INFORMANTS WERE ORDERED TO MAKE A CASE AGAINST CODELL GRIFFIN AND WERE PROMISED MONEY, GOVERNMENTAL IMMUNITY, AND/OR LENIENCY, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

II

WHETHER EVIDENCE THAT THE APPELLANT HAD INTRODUCED A WILLING BUYER TO A WILLING SELLER OF DRUGS, AT THE REQUEST OF THE BUYER, IS SUFFICIENT TO SUSTAIN HIS CONVICTION FOR DISTRIBUTING DRUGS AND POSSESSING DRUGS WITH INTENT TO DISTRIBUTE, UNDER EITHER OF THE THEORIES OF CONSTRUCTIVE POSSESSION OR AIDING AND ABETTING WHEN APPELLANT DID NOT CONTROL THE TRANSACTIONS AND DID NOT PARTICIPATE IN THEM.

III

WHETHER IT WAS REVERSIBLE ERROR TO PERMIT DETAILED TESTIMONY ON THE APPELLANT'S PRIOR CONVICTION WHEN THE PROSECUTOR HAD CERTIFIED RECORDS OF THAT CONVICTION, THE PREJUDICE OF THAT TESTIMONY OUTWEIGHED ITS PROBATIVE VALUE, AND THE APPELLANT HAD NOT AFFIRMATIVELY PUT HIS MOTIVE, INTENT, OR STATE OF MIND "AT ISSUE."

IV

WHETHER IT WAS REVERSIBLE ERROR TO PERMIT EVIDENCE THAT THE APPELLANT WAS SELLING DRUGS FROM 1967-1969 WHEN THE CONSPIRACY CHARGED IN THE INDICTMENT WAS ALLEGED TO HAVE BEGUN IN 1971, WHEN THE APPELLANT WAS THE ONLY INDIVIDUAL INVOLVED DURING BOTH TIME PERIODS, AND WHEN THERE WAS NO FURTHER EVIDENCE OF CONSPIRATORIAL ACTIVITIES UNTIL 1974 OR 1975

V

WHETHER THE SINGLE CONSPIRACY CHARGED WAS PROVED WHEN TWO OR THREE OF APPELLANT'S ALLEGED CO-CONSPIRATORS WERE SHOWN TO BE OPERATING INDEPENDENTLY OF THE APPELLANT AND THE OTHERS.

VI

WHETHER THE VARIANCE BETWEEN THE INDICTMENT AND THE PROOFS PREJUDICED APPELLANT'S SUBSTANTIAL RIGHTS AND REQUIRES A NEW TRIAL WHERE THE JURY WAS PERMITTED TO CONSIDER THE ACTS AND DECLARATIONS OF THE SEPARATE CONSPIRACIES AND THE DRUGS THEY SOLD AS EVIDENCE OF THE SINGLE CONSPIRACY CHARGED AND AS EVIDENCE OF THE APPELLANT'S ROLE IN THAT CONSPIRACY.

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VIII

WHETHER IT WAS REVERSIBLE ERROR TO DENY A MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT II WHERE THE GOVERNMENT HAD NOT PROVED AN ELEMENT OF THAT CHARGE WHEN AS A RESULT THE JURY WAS ALLOWED TO CONSIDER THE APPELLANT'S WEALTH AND HIS WIFE'S ASSETS AS EVIDENCE OF HIS GUILT ON THE REMAINING CHARGES WITHOUT ANY PROOF THAT THOSE ASSETS WERE THE BY-PRODUCT OF NARCOTICS ACTIVITIES.

IX

WHETHER RESENTENCING IS CALLED FOR IN THE EVENT SOME OF THE CONVICTIONS ARE REVERSED, AND SINCE THE APPELLANT WAS SENTENCED UPON INFORMATION HE HAD NO OPPORTUNITY TO REBUT AS WELL AS BEING SENTENCED UPON CONSIDERATIONS OF GENERAL PUBLIC DETERRENCE RATHER THAN INDIVIDUAL FACTORS.

STATEMENT OF THE CASE

CODELL GRIFFIN was indicted along with eight (8) others for conspiring together and with others to distribute narcotics. CODELL GRIFFIN was also charged with three (3) Counts of possessing heroin with intent to distribute and with six (6) Counts of distributing heroin. CODELL GRIFFIN alone was charged with engaging in a continuing criminal enterprise which incorporated the alleged violations mentioned above.

CODELL GRIFFIN was tried jointly along with five (5) other Defendants. After the Government had concluded its case, one Count of distributing heroin was dismissed as to the Appellant. CODELL GRIFFIN and one (1) other Defendant were convicted of conspiracy and the Appellant was convicted of three (3) Counts of heroin distribution. The Jury was unable to reach a verdict on the continuing criminal conspiracy charge and the Court formally declared a mistrial on that Count at the time of sentencing.

CODELL GRIFFIN was sentenced to fifteen (15) years on all four (4) Counts, to run concurrently, with a special parole term of five (5) years.

STATEMENT OF FACTS

CODELL GRIFFIN, WILLIE GRIFFIN, "ROY," "JEW," "KENNY," "MONK," "RICO," "GYPSY," and DONNA FORTE were indicted for alleged narcotics activities. Count I charged a conspiracy to distribute narcotics running from September, 1971 and continuously thereafter up to and including the date of the filing of the Indictment. Count II charged CODELL GRIFFIN alone with engaging in a continuing criminal enterprise, and alleged Counts I, III through VI, and VIII through XII to be part of a continuing series of violations on the part of the Appellant. Counts III, IV and V charged CODELL GRIFFIN with possessing heroin with intent to distribute. Counts VI and VIII charged CODELL GRIFFIN alone with distributing heroin. Count IX charged CODELL GRIFFIN, WILLIE GRIFFIN and "ROY" with distributing heroin. Count X charged CODELL GRIFFIN and "JEW" with distributing heroin. Count XI charged CODELL GRIFFIN and "MONK" with distributing heroin, and Count XII charged CODELL GRIFFIN and "KENNY" with distributing heroin.

CODELL GRIFFIN, WILLIE GRIFFIN, "KENNY," "MONK," "RICO" and DONNA FORTE were jointly tried. Most of the crucial testimony came from Government informants or from co-conspirators who had been promised leniency. The most damaging testimony came from "KID" and "COUNTRY," Government informants who had been directed by Government Agents to buy heroin from CODELL GRIFFIN and who had been promised money and other rewards for their efforts and their testimony (App 1-20).

To prove the conspiracy charged, which was alleged to have operated continuously since September, 1971, the Government introduced Appellant's 1971 conviction for drug possession in its case-in-chief. The arresting officer testified in detail about the circumstances of the 1971 arrest and a police chemist also testified about his analysis of those drugs (App 34-38).

For the same purpose, the Court allowed testimony that Appellant had sold drugs from 1967 to 1969. Although the Government contended that the conspiracy charged had actually been in operation since 1967, there was a five (5) year gap in the evidence. It was not until 1974 or 1975 that the Appellant was next shown to be selling drugs and of the people said to have been involved in 1967 - 1969, CODELL GRIFFIN was the only alleged conspirator whose name arose again (App 39-54).

Although the Indictment charged that a single conspiracy existed among the Defendants and co-conspirators, two (2) Defendants, "KENNY" and "MONK," were shown to be operating independently with a third person. The only manner in which the Appellant was connected with this separate enterprise was that he had introduced a buyer, a Government informer, to the two (2) Defendants who subsequently made drug sales (App 55-68). These two introductions resulted in two (2) of CODELL GRIFFIN's three (3) convictions for distributing drugs (App 21-33).

At the close of the Government's case relating to the Appellant's alleged drug activities, the evidence disclosed that a large number of people, some who had been indicted and some who had not, had been selling drugs on 116th Street. Some had either sold drugs to or bought them from CODELL GRIFFIN, but once these transactions were completed they were free to buy drugs from or sell drugs to anyone they wished with no supervision or control from the Appellant (App 73-78). Defense counsel moved for a Judgment of Acquittal on the continuing criminal enterprise charge claiming that the Appellant had not been shown to have had a managerial or supervisory role over five (5) or more people and therefore evidence of substantial profits was immaterial. The Court denied the Motion (App 79).

To establish that CODELL GRIFFIN had made substantial profits from narcotics trafficking, the Government introduced evidence of his purchases, his holdings, the purchases and holdings of his wife and his Income Tax Returns from 1970-1975 (App 80-90, 97-128). None of this evidence was ever proven to be the products of illegal drug dealing and there was testimony that CODELL GRIFFIN had been very successful at gambling (App 129-135). Defense counsel objected to the proposed introduction of evidence that MS. GRIFFIN was receiving welfare on the grounds that it would subject the Appellant to uncharged allegations of welfare fraud. When the Court held that the evidence would be admitted unless it was stipulated that CODELL GRIFFIN was the sole source of support

for his wife, the defense so stipulated (App 91-96). Other than this stipulation, it was never proven that the Appellant was the source of the funds his wife used to make her purchases.

The Jury was instructed generally on conspiracies but was never given instructions on multiple conspiracies. The Jury was informed that the conspiracy charged had to be proven beyond a reasonable doubt but was not instructed that evidence of separate conspiracies would not prove the conspiracy charged, that evidence of separate conspiracies could not be considered against those Defendants not proven to be members of that conspiracy, and that Defendants shown to be members of conspiracies other than that charged must be acquitted. The Jury was not informed how to distinguish between one mass conspiracy and several similar but unrelated conspiracies, and it was not instructed on the limited purpose to which the 1967-1969 narcotic activities of the Appellant could be put (App 69-72).

Count X was dismissed as to the Appellant after the Government had rested. The Jury convicted CODELL GRIFFIN of conspiracy to distribute drugs, Count I, and of three (3) substantive violations, Counts IX, XI and XII. The Jury was unable to reach a verdict on the continuing criminal conspiracy charge and the Court formally declared a mistrial on that Count at the time of sentencing.

When CODELL GRIFFIN appeared for sentencing, the Court informed the defense that the Government had presented memorandums on sentences the Courts in that District had handed down in other cases. The Government argued that the Court should follow those

prior sentences in this case, and the Court admitted that the information had affected its decision to some extent.. When the defense requested an opportunity to review the documents so as to be able to make an intelligent reply, it was not allowed to do so. After listening to the Prosecutor's position on the evidence against the Appellant, the Court stated that the sentence in this case would be based primarily on the deterrent effect that it would have on others in the community and immediately thereafter sentenced the Appellant to fifteen (15) years on each Count, to be served concurrently, with a special parole term of five (5) years (App 136-142).

BAIL STATUS OF DEFENDANT-APPELLANT

Defendant-Appellant is present in custody without bond

I

THE CONDUCT OF THE GOVERNMENT IN DIRECTING
INFORMANTS TO INCRIMINATE THE APPELLANT FOR
A FEE IS OUTRAGEOUS ENOUGH TO REQUIRE THE
EXCLUSION OF THEIR TESTIMONY, AND IS SUFFI-
CIENT TO VIOLATE DUE PROCESS OF LAW AND TO
BAR THE CONVICTION.

JAMES BRYANT (KID) and WILLIAM CLARK (COUNTRY) were two (2) essential Government witnesses at trial. Each testified as to narcotics involvements on the part of the Defendants. Each was a Government informant who had been directed to "get" CODELL GRIFFIN and were well rewarded for their services and testimony.

COUNTRY had been a D.E.A. informant since 1969 (App 1). He had worked on eight previous cases (App 2) and for his efforts here COUNTRY received \$5,700.00 (id). D.E.A. AGENT BLACKBURN first met COUNTRY in August, 1975 (App 3). On August 28, 1975 and September 12, 1975, BLACKBURN sent COUNTRY to 116th Street (App 4) with specific instructions to buy two ounces of pure heroin from the Appellant (App 5). To carry out these orders COUNTRY either went to 116th Street alone or with AGENT BLACKBURN and requested CODELL GRIFFIN to supply him with drugs on December 30, 1975, February 4, 1976, June 29, 1976 and July 14, 1976. On July 14, 1976, COUNTRY went to 116th Street twice.

On June 29, 1976, COUNTRY was paid \$2,000.00 of the approximately \$5,000.00 he had been promised by AGENT BLACK BURN (App 6-8). COUNTRY made his first buy on June 29, 1976, and the money was paid before hand (App 9). COUNTRY made two buys on July 14, 1976 and was

paid \$400.00 on that day (id). On September 29, 1976 COUNTRY testified before the grand jury in this case (id). The D.E.A. had paid him \$1,000.00 for that testimony on September 26, 1976 (App 10). On November 22, 1976 COUNTRY testified at the trial of a co-defendant, CHARLES MILOM. COUNTRY had received \$1,500.00 for the testimony on November 29, 1976 (App 11). He knew he would be paid for his testimony in the MILOM trial but did not know the amount (App 12). COUNTRY admitted that he would ask for money after the trial in the instant case (App 13), and even went so far as to concede that he would expect more money if a convict on resulted (App 14).

KID became a D.E.A. informant in February 1976 (App 15) and was involved in this case until June 28, 1976 (App 16). This was his first effort as an informant (Op Cit), and for his six month involvement he was paid \$6,000.00 by the Government (App 17). As of February, 1976 KID was investigating CODELL GRIFFIN for the Government (App 18) and from that date he was following the orders of AGENT BLACKBURN to buy drugs from the Appellant (id). KID attempted to purchase drugs from CODELL GRIFFIN on February 13, 1976, March 4, 1976, March 5, 1976, May 14, 1976, June 26, 1975 and June 28, 1976. KID received \$300.00 on February 13, 1976, and by September, 1976 he had been paid \$3,000.00 (App 19). Later, AGENT BLACKBURN agreed to pay another \$3,000.00 for his testimony in this case (App 20).

Thus, of three witnesses who stated that CODELL GRIFFIN had participated in drug trafficking, JAMES BRYANT, LEANDER CLARK and WILLIAM CLARK, the two most important to this case, JAMES BRYANT (KID) and WILLIAM CLARK (COUNTRY) had either been promised immunity,

large sums of money, or both, and had acted upon the specific orders of their control agent to "make a case" against the Appellant.

In Williamson v. United States, 311 F2d 441 (5th Cir 1962) the defendant had been convicted of a liquor offense based upon the testimony of an informant. The informant had volunteered his services to a government agent, was directed to "catch" the defendant, and was promised money for his efforts. The court of appeals labled this a "contingent fee" arrangement and found it to require a reversal even though entrapment was not shown.

...we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a 'frame up', or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration. Williamson, supra, at 444.

United States v. Joseph, 533 F2d 282 (5th Cir 1976) and other cases following Williamson, supra, have subsequently limited the doctrine to situations where an informant was paid a contingent fee to get evidence against a specific individual.

In United States v. Neal, 536 F2d 533 (2d Cir 1976) the second circuit relied on United States v. Cuomo, 479 F2d 688 (2d Cir 1973) to reject an appeal brought under Williamson, supra, because the testimony had come from an informer who had not been paid a contingent fee nor had he been directed against a specific suspect. In Cuomo, supra, the informant had likewise been employed to engage in narcotics transactions generally and not to deal with the defendants there specifically.

Like Williamson, supra, and unlike either Joseph, supra, Neal

supra, or Cuomo, supra, there is no question that COUNTRY and KID were specifically directed to make a case against CODELL GRIFFIN in particular. Their specific orders from AGENT BLACKBURN, the agent in charge of the case, were to buy two ounces of pure heroin from CODELL GRIFFIN. During all of their encounters on 116th they sought out the Appellant for that purpose. Neither can it be disputed that the informants here received a contingent fee within the meaning of Williamson, supra. COUNTRY was promised \$5,000.00 and was paid \$2,000.00 of that, the day he allegedly made his first buy, June 29, 1976. He was paid \$400.00 on July 14, 1976, the day he made two buys, he received \$1,000 for his grand jury testimony three days prior to that testimony, and he received \$1,500.00 on November 29, 1976, one week after his testimony at a related trial. He knew he would be paid for the grand jury testimony but did not know how much. COUNTRY intended to ask for money after his testimony in this case and if the Defendants were convicted he planned to demand a higher amount. In United States v. Onori, 535 F2d 938 (5th Cir 1976) the Fifth Circuit held at 942 that there was a contingent fee arrangement within the meaning of Williamson, supra, where an informant testified that she expected to receive compensation after a case "went down." There is no question that KID expected money for incriminating CODELL GRIFFIN. He received \$6,000.00 for his efforts and received his first payment on February 13, 1976 when he began working on the case. By September, 1976 those partial payments added up to \$3,000.00 and AGENT BLACKBURN promised him another \$3,000.00 for his testimony at trial. Nor was the KID'S expected reward limited to money. Since

he allegedly was involved in drug trafficking himself the promises of immunity or leniency that were made also weighed heavy on his mind.

In United States v. Neal, supra, the argument that the police conduct there was so "outrageous" as to bar the conviction was rejected because the record did not approach the facts of Williamson, supra. United States v. Cuomo, supra, also rejected that argument for similar reasons. The Cuomo court was aware of the language in United States v. Russell, 411 U.S. 423, 432 (1973) that "some day" it might be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to a conviction," but it found that the facts in Cuomo made it "distinctly not of that breed."

Here, the case clearly is "of that breed." Not only did the Government use paid informants to obtain contraband with Government money, but the informants were directed to proceed against specific individuals and their compensation was handled so as to encourage them to proceed in such a manner as to consider their own potential benefits over the innocence of their "prey." As in Williamson supra, the opportunities for abuse are too obvious for elaboration. At no time did CODELL GRIFFIN seek out these informants and offer to sell drugs. In every instance KID and COUNTRY pursued the Appellant, their target, with a virgor that seems out of character considering their past history, but that comes into full focus when the promises made to them by the Government are considered.

There is no evidence that either COUNTRY or KID was instructed

to avoid entrapment, and there is evidence that they were guaranteed payment of large sums of money and/or immunity for past crimes, as well as their being ordered to "make a case" against a specific suspect, which are factors to be considered when determining the propriety of the Government conduct according to United States v. Garcia, 528 F2d 580, 587 (5th Cir. 1976). The Government was in direct violation of Williamson v. United States, supra, and its' conduct was "outrageous" enough to require that the testimony of the informants should have been excluded and the convictions reversed according to United States v. Russell, supra and Hampton v. United States 48 Led 2d 113 (1976). This should be the outcome whether or not this constitutional issue was raised in the court below. United States v. Cuomo, supra, at 691-692.

II

THE APPELLANT WAS IMPROPERLY CONVICTED ON
TWO COUNTS BECAUSE HIS PARTICIPATION IN
THE SUBSTANTIVE OFFENSES WAS NOT PROVEN.

The Jury convicted the Appellant of three Counts of distributing heroin and of possessing heroin with intent to distribute, Counts IX, XI, and XII. Two of these Counts, Counts XI and XII, were based on testimony that CODELL GRIFFIN introduced COUNTRY to the actual sellers after the informant asked for drugs and the Appellant said he had none (App 21-28). In Count XI, it was MONK who delivered the drugs and received the money. In Count XII, KENNY delivered the drugs and received the money. CODELL GRIFFIN was not shown to have provided the drugs that were sold by KENNY and MONK nor was he shown to have been the ultimate recipient of the money paid by the informant. There was no evidence that CODELL GRIFFIN had any dealings with KENNY and MONK either before or after the sales made on June 29, 1976 and July 14, 1976. In fact, COUNTRY purchased drugs from KENNY a second time on July 14, 1976 without ever approaching the Appellant. That the sole basis for charging CODELL GRIFFIN in Counts XI and XII was his introductions of COUNTRY to KENNY and MONK is shown by the fact the Prosecutor stated that the Appellant was not charged in Count XIII with the second sale made by KENNY on July 14, 1976 because COUNTRY had not spoken to him about that sale (App 29-31). CODELL GRIFFIN contends that the evidence relating to COUNTS XI and XII at best established that he knew MONK and KENNY and was aware that they sold drugs. The record is completely barren of any relationship between CODELL GRIFFIN, KENNY and MONK such that the Appellant could be held

criminally responsible for their independent illegal activities. CODELL GRIFFIN had no dealings with MONK prior or subsequent to June 29, 1976 and was not shown to have had any dealings with KENNY prior or subsequent to July 14, 1976. A "working relationship" between the parties was not established.

In United States v. Jones, 308 F2d 26 (2d Cir 1962) the defendant had been convicted of distributing illegally imported heroin based upon evidence that he: had approached the buyer and arranged to introduce him to the "connection;" that he introduced the buyer to a man who delivered the heroin and accepted the money; that the seller said not to deal with anyone else in the future, and; that he had received money from the buyer for the introduction. The court found that the defendant had neither possession or constructive possession of the drugs and his conviction was reversed. The decision was based on proof that the Defendant had to locate the seller, he was unable to consummate the deal on his own, neither price nor terms could be discussed until the Defendant spoke to the seller and the seller told the buyer to deal with him and no one else.

...a casual facilitator of a sale who knows a given principle possesses and trades in narcotics but who lacks the working relationship with that principal that enables in assurance of delivery, may not be held to have dominion and control over the drug delivered and cannot be said to have possession of it. Jones, supra, at 30.

The Second Circuit also held that the defendant could not be convicted of aiding an abetting the crime since possession or constructive possession was an essential element. Jones, supra, at 31-33.

In United States v. Hysohion, 448 F2d 343 (2d Cir. 1971), a Defendant has been convicted of conspiring to deal in heroin knowing it was illegally imported, but was acquitted of substantive offenses, on the grounds that he was a mere facilitator who knew a source of drugs but could not assure delivery. The Court of Appeals relied on United States v. Jones, supra, to reverse the conviction. The conspiracy conviction of another was reversed as well because a conviction for conspiracy to commit a substantive offense was held to require proof of the degree of criminal intent necessary for a conviction on the substantive offense, and:

...a defendant lacks constructive possession if he does "nothing except to introduce a willing buyer to a willing seller and to serve as a go between until such time as the willing seller and willing buyer are satisfied to do business with one another. Hysohion, supra, at 348.

Here, CODELL GRIFFIN merely introduced COUNTRY to KENNY and MONK. The Appellant did not approach the informant with an offer to sell drugs through KENNY and MONK. When the informer approached him asking for drugs on June 29, 1976 and July 14, 1976, the Appellant indicated an inability to make a sale. When pressed for anyone having drugs, the Appellant merely directed COUNTRY to others. As in United States v. Jones, supra, and United States v. Hysohion, supra, CODELL GRIFFIN was a mere facilitator in these transactions, a go between at best, who had no control over the drugs delivered and who cannot be said to have had either possession or constructive possession of the drugs. Once the introductions were made, CODELL GRIFFIN had no further involvement in either transaction. He did

not discuss the price, the terms of payment or delivery, and he even told COUNTRY that he would have nothing further to do with it (App 32-33). That COUNTRY went directly to KENNY in the evening of July 14, 1976 for a second purchase without even approaching the Appellant indicates that COUNTRY felt he was dealing with KENNY alone. Unlike United States v. Jones, supra, CODELL GRIFFIN did not even receive payment for the introduction. For a connection between a buyer and a seller to become criminally liable he must have some personal stake in the venture, and the evidence on Counts XI and XII completely lacked such proof.

Thus, according to United States v. Jones, supra, and United States v. Hysohion, supra, the appellant was not proven to have had either possession or constructive possession of the drugs sold by KENNY and MONK on June 29, 1976 and July 14, 1976. The Appellant was not alleged to have had actual possession, and without some type of possession being shown he cannot be convicted of possessing drugs with intent to distribute as an aider and abettor. For the same reasons the proof did not establish that CODELL GRIFFIN distributed drugs on June 29, 1976 and July 14, 1976 or that he aided and abetted in those distributions. One cannot distribute something he did not possess and he cannot aid and abet another in a distribution without having actual possession or constructive possession of the thing being distributed.

III

IT WAS REVERSIBLE ERROR TO ALLOW THE
APPELLANTS DISSIMILAR PRIOR CONVICTION
INTO EVIDENCE AND TO PERMIT THE GOVERN-
MENT TO GO INTO THE DETAILS AND CIRCUM-
STANCES OF THAT CRIME.

After trial had begun, the Government made known its intention to introduce a 1971 heroin possession conviction of CODELL GRIFFIN under the theory that it was a similar act and showed his motive or intent in the case at bar (App 34). Over the objection of the Defendant (App 35), and although the Prosecutor admitted that the facts of this case were sufficient to show criminal intent or motive by saying that ". . . the propensity I think is established by this case here on trial," (App 36), the Court allowed evidence of the conviction to be introduced. The Court did not specifically rule that the probative value of such evidence would outweigh the prejudice but that apparently was the conclusion it reached.

Although it was later discovered that the Prosecutor had certified records of the 1971 State conviction proceedings (App 37), New York Police Officer ROBERT BOUTINEAU was called as a witness. He testified that in January, 1971, he was on undercover surveillance when he saw two men exchanging money and envelopes. The officer went on to describe his observations based on past experience as a police officer and the circumstances of the arrest as well as the booking procedure at the station. On re-direct, the Prosecutor went even further into the specifics of the 1971 arrest. Again, over objection, the Government next produced a police chemist who testified about his examination of the drugs seized in 1971. These facts were emphasized by the Prosecutor during his argument to the Jury (App 38).

A. THE EVIDENCE WAS INADMISSIBLE BECAUSE THE PREJUDICE OUTWEIGHED THE PROBATIVE VALUE.

Federal Rule of Evidence 404(b) provides that:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

However, even if evidence of a conviction would be admissible under 404(b), Rule 403 holds that:

"(a)lthough relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ."

Appellant contends that evidence of his 1971 conviction was inadmissible and that the Judge abused his discretion by allowing that evidence to be presented to the jury. Although he pled guilty in 1971 to possession of heroin, rather than introducing into evidence the official records of that conviction it had in it's possession, the Government presented witnesses who testified in detail about the circumstances of the 1971 arrest that plainly exposed the jury to the inference that CODELL GRIFFIN was actually guilty of distributing heroin rather than mere possession. In United States v. Smith, 353 F2d 166 (4th Cir 1965), where the defendant took the stand and admitted a prior conviction, the Court held that on cross-examination, the prosecutor should be restricted to the fact of the conviction and the details of the earlier criminal conduct should not be explored. In United States v. Tomaiolo, 249 F2d 683 (2nd Cir 1957), the defendant had taken the stand, admitted a prior conviction and on

cross-examination the prosecutor was permitted to go in depth into the details of the crime. Because of errors in the admission of evidence and in the conduct of Government counsel, the defendant was found to have been denied a fair trial and the conviction was reversed.

We cannot see that any of this detail was relevant to the charge on trial; it went far beyond what was necessary to establish a criminal conviction for the purpose of impeaching credibility. Its obvious purpose and effect was to do more than to impeach defendant's credibility -- it was intended to show that he was a dangerous criminal. Although the degree to which counsel may dwell on a particular point is within the discretion of the trial judge, it seems to us that here this discretion was not wisely exercised. Tomaiolo, supra, at 687.

The evidence here clearly was not limited to establishing the type of the Appellant's prior conviction, but probed in depth the nature of the crime and its details. The same limitations imposed in United States v. Smith, supra, and United States v. Tomaiolo, supra, should also be applied where a defendant does not take the stand and cannot contest the evidence of past crimes. Instead, nearly forty pages of the transcript here (T. 1507-42) are directed to testimony about the 1971 guilty plea and the charge was effectively re-litigated before the jury.

It is desirable in any criminal trial to keep from the jury any evidence of malfeasance by the defendants not related to the charge at issue. United States v. Tomaiolo, supra.

. . . if a defendant does not take the stand, the prosecutor may not establish that the defendant committed other misdeeds (whether amounting to a conviction or not). The reason for this limitation is that such

collateral evidence would "weigh too much with the jury and . . . so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. United States v. Perry, 512 F2d 805, 806 (6th Cir. 1975) citing Michelson v. United States 353 U.S. 469, 475 (1948).

The public policy behind the general rule of inadmissibility of evidence of crimes other than the crime charged is the risk that the Defendant may be convicted because of past wrongdoings. United States v. Carter 516 F2d 431 (5th Cir. 1975). That is exactly the danger that the Appellant was subjected to in the case at bar. CODELL GRIFFIN was charged with conspiracy to distribute heroin, substantive Counts of heroin distribution, and a continuing criminal conspiracy. Under the justification of the "similar acts" exception, the Government introduced evidence of a possession conviction as well as testimony implying that he was actually guilty of heroin distribution, a crime he had not been convicted of. In United States v. Miller 500 F2d 751 (5th Cir. 1974), evidence of a prior conviction for possession of untaxed liquor was found to be error since it was said to have little relation to the charge of conspiracy to defraud the Government by the manufacture of untaxed whiskey. The conviction for simple possession of a small amount of drugs has an even more tenuous relationship to the charges against CODELL GRIFFIN and does not fall within the exceptions contained in Rule 404(b) of the Federal Rules of Evidence. Even more prejudicial though, was the detailed exploration of that offense that forced the Appellant to defend against a five (5) year old charge.

Evidence of this irrelevant conviction and the manner in which it was introduced unquestionably prejudiced the Appellant and denied

him a fair opportunity to defend himself against the crimes with which he was charged in this case. It cannot be said beyond any reasonable doubt that the Jury convicted CODELL GRIFFIN of the charges against him without considering his prior conviction, United States v. Williams 523 F2d 407 (2d Cir. 1975). The prejudice arising from that evidence was thus greater than its probative value within the meaning of Rule 403.

To show that defendant is guilty of similar crimes may indirectly lead the jury to infer that defendant is guilty of the crime charged.

If judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification. C. McCormick, Evidence, §190 at 143 (2nd Ed 1954). Luck v. United States 348 F2d 763, 768 N.8 (D.C. Cir. 1965).

B. THE EVIDENCE WAS INADMISSIBLE BECAUSE NONE OF THE EXCEPTIONS PERMITTING ITS ADMISSION INTO EVIDENCE WERE SUFFICIENTLY DISPUTED OR "AT ISSUE."

Other than pleading not guilty, the Appellant did not raise his state of mind as a contested matter. The Appellant did not testify. He did not raise the defense of knowledge, nor were motive, opportunity, preparation, plan, identity, mistake or accident ever affirmatively disputed. The defense raised was simply that the Government had not proven his guilt beyond a reasonable doubt.

While the exceptions of Rule 404(b) were used as the justification for introducing the otherwise inadmissible evidence of

other criminal conduct, the trial court erred in so ruling because the exceptions were inapplicable.

In Hamilton v. United States, 409 F2d 928 (5th Cir 1968), the defendant had been convicted of selling untaxed liquor. Evidence of prior similar offenses had been admitted to show her intent. As the Fifth Circuit saw it, the only issue was whether she sold the liquor. If the sale took place, defendant was guilty; if it did not occur, defendant was not guilty. Since there was no question of motive, intent, etc., evidence of a prior offense was inadmissible and was reversible error.

"The courts recognize that a jury is likely to reach a guilty verdict for the wrong reason, i.e., by concluding from the evidence of a prior conviction that the defendant is guilty because he has a criminal disposition and is given to unlawful acts, unless their attention is properly focused on the matter of intent . . . In the instant case, . . . , it is fairly obvious that intent, . . . , was not an issue. There is great danger, enough to call for a new trial, that the jury being unable to focus on a non-existent issue, might have taken the prior conviction as evidence that Mrs. Waker committed the crime because she was given to violating the liquor laws." (citations omitted). Hamilton, supra, at 930.

In United States v. Adderly, 529 F2d 1178 (5th Cir 1976), the Fifth Circuit again discussed the admissibility of evidence of a prior offense to show intent. After one hung jury, the Defendant was convicted on two counts -- conspiracy to conduct, and conducting an illegal gambling business. She had been arrested in a room containing gambling paraphernalia, but claimed she knew nothing about it and was there on an errand. In other words, she claimed an innocent state of mind. The issue was whether evidence

of a prior gambling offense was admissible to demonstrate her state of mind. Under the particular facts of this case, the Court found no error, but reaffirmed the Hamilton decision.

"All crimes other than those imposing strict liability require a degree of culpability, either knowledge, intent, recklessness or willingness. Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and on the nature of the defense. A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made an issue of intent. A defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred." (citations omitted).

"It is only after the defense is presented that the trial judge can know if intent or knowledge or any exception to the exclusion rule is truly a disputed issue in a trial. In the instant case the government introduced the prior convictions during its case in chief. We hold that under the peculiar circumstances of this case -- where the government could anticipate the defense testimony because of the previous trial which resulted in a hung jury -- the untimely admission of a prior-misconduct evidence does not provide grounds for reversal." (citations omitted). Adderly, supra, at 1181, 1182.

United States v. Miller, 508 F2d 444 (7th Cir 1974) involved a conspiracy to violate the Dyer Act and an actual violation of the act. The defendants had contested the admissibility of evidence that they had kidnapped and threatened others during the course of the crime. The Seventh Circuit concluded that such evidence would not be admissible to show criminal intent or knowledge unless the defendants affirmatively contested their intent and knowledge. The defendants in Miller did not testify or present evidence.

"Finally, such evidence would not be admissible to establish criminal intent or knowledge unless and until the defendants affirmatively contested their intent and knowledge that the Chevrolet was stolen. In the instant case, defendants did not testify or present any evidence in their behalf. Since intent is always an issue, it would emasculate the rule to hold that evidence of other crimes may always be admitted to show criminal intent.

. . . to justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon. When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of this type of evidence." (citations omitted). Miller, supra, at 450.

United States v. Ring, 513 F2d 1001 (6th Cir 1975) was also concerned with the issue present here. The defendant was convicted of mailing threatening letters, in part, based on testimony that he had previously threatened a third party over the telephone. The evidence was admitted during the prosecutors case-in-chief on the grounds that it showed state of mind, motive and intent. The Sixth Circuit strongly rejected the argument that the past threat was admissible under the intent exception to the general rule excluding evidence of prior misconduct. Intent was not seen as a genuine issue because the defendant had not taken the stand and asserted a defense of mistake or innocent state of mind.

"The mere recitation by the prosecution that evidence of the accused's bad acts is offered under an exception is not sufficient for its admission. . . (E)vidence of prior misconduct may not be

admitted under any exception unless the matter for which the evidence is offered is 'in issue.' (citations omitted).

. . . (E)vidence of prior bad acts may not be introduced unnecessarily as a pretext for placing highly prejudicial evidence of a defendant's bad character before the jury.

Yet, the government argues that the mere fact that intent is an element of the offenses charged is in itself sufficient for purposes of invoking the exception permitting evidence of a defendant's prior misconduct to show intent. The dispositive issue, in our view, is this: May the 'intent' exception be invoked by the prosecution to permit admission of evidence of an accused's prior misconduct where the requisite criminal intent would normally be inferred and the criminal act, if proven, . . . and where, at the same time, the defendant has not asserted the defense of an innocent state of mind? we conclude that it may not.

Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice." Ring, supra, at 1004-1005, 1007, and 1008 respectively. (emphasis added).

See also, United States v. Ailstock, 546 F2d 1285 (6th Cir 1977); United States v. Clemmons, 503 F2d 486 (2th Cir 1974).

According to United States v. Adderly, supra, the prerequisite for admission of prior misconduct are that:

The prior offense must be similar and must be convincingly proved, it must

not be too remote in time, the exception to the general rule of exclusion for which the offense is admitted must be a material issue in the instant case, and there must be a substantial need for the evidence. The probative value of such prior misconduct must also be balanced against its prejudicial effect. Adderly, supra, at 1180.

A defendant who admits committing an act but relies on innocence, mistake or lack of knowledge to exculpate him has made an issue of intent. A defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred. Adderly, supra at 1181.

Intent admittedly is an element of conspiracy and a prior offense which tends to establish the conspiracy would be admissible as an exception to the general rule barring such evidence if it was "at issue." However, a conviction for possession of drugs cannot be said to establish either the intent to distribute drugs or the intent to conspire to distribute drugs and as such, no exception to the rule exists. See United States v. Ailstock, supra. Any exceptions such as motive or intent were not "at issue" here and there was no substantial need for the evidence. If the Government had been able to prove the acts charged, the motive, intent and guilt of the Defendants could be inferred. This much the Prosecutor admitted when he said that the Defendant's guilt and their propensity to commit the crimes charged was ". . . established by this case on trial."

Although this circuit has apparently never spoken directly on this issue, it seems to have at least recognized it and should take this opportunity to adopt the approach of a number of other circuits. In United States v. Ong, 541 F2d 331 (2nd Cir 1976), the defendants had been convicted of conspiring to bribe federal officers. One

argument on appeal was that tapes played at trial contained evidence of other crimes in that the defendants had discussed bribing state officials as well as narcotics trafficking in Chinatown. The Court concluded that the testimony about drugs was harmless since it did not incriminate the defendants but only showed their awareness of the presence of drugs. Further, the jury was instructed that this was irrelevant to the case. The evidence that the defendants had bribed state officials was found to constitute no error because the defendants had claimed that the bribes had been coerced from them, and such admissions by the defendants in front of the federal officers was an indication that they were on good terms. The fact that the defendants were aware of the contents of the tapes prior to trial and had not moved to suppress them as the Court had ordered, was a further indication that they did not regard the tapes as prejudicial.

CODELL GRIFFIN was improperly exposed to highly prejudicial evidence when the Court permitted introduction of his prior conviction. He did not learn of the Prosecutor's intent to introduce this evidence until after trial had begun. The evidence was not of some completely unrelated crime such as bribery, and unlike Ong, supra, the Appellant had not affirmatively raised some defense that the evidence would negate. CODELL GRIFFIN did state that he committed the acts charged but had an innocent state of mind with no intent to sell illegal drugs. The defense was that his guilt had not been proven beyond a reasonable doubt, and since none of the exceptions of Rule 403 were "at issue," the evidence of his conviction could only have been to show his guilt.

Since the introduction of this evidence was erroneous and any probative value it may have had was greatly outweighed by the resulting prejudice, it cannot be said beyond a reasonable doubt that it played no role in the conviction of the Appellant, and the convictions must be reversed. United States v. Williams, supra.

IV

IT WAS REVERSIBLE ERROR TO ADMIT EVIDENCE THAT THE APPELLANT WAS INVOLVED WITH DRUGS IN 1967 WHEN THE INDICTMENT CHARGED A CONSPIRACY BEGINNING IN 1971, AS A GREAT DEAL OF TIME HAD PASSED, NONE OF THE OTHER CONSPIRATORS NAMED IN THE INDICTMENT WERE INVOLVED PRIOR TO 1974, AND THERE WAS NO PROOF OF A SINGLE CONSPIRACY CONTINUING FROM 1967 TO THE DATE CHARGED IN THE INDICTMENT.

After trial had begun, the Prosecutor announced his intention to introduce testimony that CODELL GRIFFIN was involved with drugs in 1967 to 1969 as evidence of the conspiracy charged in the indictment, which was alleged to have begun in September, 1971 (App 39). Over the objection that it was not evidence of the conspiracy charged in the indictment, the Court found the testimony to be admissible (App 40-41).

WILLIAM CLARK (COUNTRY) testified that in September, 1967, he began selling drugs for CODELL GRIFFIN with a number of other individuals. COUNTRY said he did so for approximately one (1) year and then branched out on his own. Shortly thereafter, sometime in 1969, COUNTRY was sent to jail and became a Government informant. COUNTRY had no further contact with the Appellant until September, 1975 (App 42-43).

The fact that CODELL GRIFFIN was involved with drugs in 1967 to 1969 was presented as proof of the conspiracy alleged to have begun two (2) years later, and as proof of the Appellant's participation in that conspiracy. This evidence was given great significance by the Prosecutor in his summation (App 44-50). The Court indicated that instructions on the subject would be given (App 51), but the

charge to the Jury did not contain such limiting instructions as far as Appellant can determine. There was absolutely no evidence presented to establish that the conspiracy charged was a continuation of or even related to the activities in 1967 to 1969. In 1969, CODELL GRIFFIN worked in a grocery store (App 52). Of all the people COUNTRY named as being involved in 1967 to 1969, the Appellant was the only person whose name also arose during the period from 1971 to 1976. After COUNTRY's testimony about 1967 to 1969, there was a two (2) year gap before the Appellant was mentioned again, which was the reference to his 1971 conviction for drug possession. It goes without saying that a Defendant cannot conspire with himself and a conviction for drug possession does not establish a conspiracy to distribute drugs. After the testimony relating to 1971, it was not until 1974 when the Appellant's name was raised again. This was LEANDER CLARK's testimony about selling drugs to CODELL GRIFFIN in 1974 (App 53-54).

Thus, between 1969, at the latest, and 1974, at the earliest, there was no evidence that the Appellant and others conspired to distribute drugs. The argument that the Appellant managed the same continuing conspiracy between those dates is without foundation.

Evidence of the 1967 to 1969 transaction was admitted as part of the same conspiracy charged in the Indictment and as proof of the association of the alleged conspirators, but it actually established nothing of the sort, because no continuing conspiracy was shown and there were no continuing relationships between any of the Defendants over that period. The Appellant and COUNTRY were the only people involved in 1967 to 1969 and during the period charged in the

Indictment, but COUNTRY could not be a continuing conspirator since he had become an informant in 1969.

In United States v. Stassi, 554 F2d 579 (2nd Cir. 1976), the Indictment charged a conspiracy running from 1970 to 1972, but evidence of narcotics transactions occurring in 1973 were allowed in. Although the Court of Appeals did not discuss the facts in detail, it appears that the 1973 transactions were between some of the same individuals that were alleged to have conspired together from 1970 to 1973. The Court of Appeals affirmed the convictions in Stassi because the disputed testimony had been admitted for the limited purpose of establishing the association of the parties charged, and because the Trial Court had repeatedly emphasized the limited purpose for which that evidence had been admitted. Stassi, supra, at 583. Here, the disputed testimony could not serve to establish the continuing association of the alleged conspirators because there were no common individuals from 1967 to 1969 and 1971 to 1976. Because of the gap of nearly five (5) years in the testimony, from 1969 to 1974, neither could the 1967 to 1969 evidence be justified, as the Government contended, as proof of a single continuing conspiracy. Unlike Stassi, supra, the Trial Court here did not repeatedly emphasize the limited purpose of the 1967 to 1969 evidence, if it instructed on it at all.

Neither does Rule 404(b) of the Federal Rules of Evidence justify the admission of this prejudicial testimony. The Appellant did not testify and deny that the events of 1967 to 1969 ever took place nor did he put his intent, knowledge, or state of mind "at issue." The exceptions present in Rule 404(b) did not exist in the case at bar. If the Government had been able to prove the

charges contained in the indictment, intent, knowledge and state of mind could have been inferred from that alone. There was no need to resort to testimony relating to 1967 to 1969 unless the Government wished to present the Appellant as a man predisposed to commit the crimes charged. Argument III, supra . By allowing testimony of prior bad acts not resulting in conviction, the trial court exposed the Appellant to evidence of uncharged crimes against which he could not defend. The resulting prejudice greatly outweighed the probative value of the 1967 to 1969 evidence within the meaning of Rule 403 of the Federal Rules of Evidence, and its admission was reversible error, Argument III, supra.

V

THE EVIDENCE PRODUCED AT TRIAL
WAS INSUFFICIENT TO ESTABLISH
THE SINGLE CONSPIRACY CHARGED
IN THE INDICTMENT.

CODELL GRIFFIN and five (5) other Defendants were jointly tried for conspiring to violate Federal Narcotic Laws. In addition to these five (5), at least five (5) others were named as co-conspirators, ROY, JEROME HATTON, JOHN D. BRYANT, LEANDER CLARK and JAMES BRYANT. The names of a large number of other individuals, including REAL THING (App 55). BUBBY (id) and GIL (App 56) were introduced at trial as unindicted co-conspirators but were never mentioned again. All were alleged to be members of one vast conspiracy headed by the Appellant.

The gist of the offense of conspiracy is an agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. United States v. Falcone 311 U.S. 199, 210 (1940).

In the instant case, the Indictment charged that the six (6) Defendants, along with others not being tried, were co-conspirators in a single scheme to possess heroin for distribution. To support this single conspiracy charge, the Defendants and others had to be shown to be "...working together understandingly, with a single design for the accomplishment of a common purpose." Fowler v. United States 273 F. 15, 19 (C.C.A. 9 Marino v. United States 91 F2d 691, 694 (9th Cir. 1937). To the contrary, all of

the Defendants were not shown to be working under CODELL GRIFFIN to accomplish a common goal. Instead of a single band of conspirators, at least three (3) of the parties were shown to be independently working toward their own objectives. Instead of one mass conspiracy, two (2) or three (3) conspiracies with similar but independent activities were shown to exist.

The test for whether a single conspiracy or multiple conspiracies has been shown was stated in United States v. Ellsworth 481 F2d 864, 869 (9th Cir. 1973) as:

...Whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the single conspiracy; if so, there is a single conspiracy.

Another way of stating it is that:

(T)o prove a single conspiracy the prosecution must show, among other things, that all the Defendants agreed to effectuate a central criminal design, in this case, an alleged scheme to dispose of narcotics in violation of Federal law. Daily v. United States 282 F2d 818, 829 (9th Cir. 1960).

While Defendants IVERY (KENNY) and BOYKIN (MONK) and GIL were charged as co-conspirators with CODELL GRIFFIN, there was no proof of a common agreement between KENNY, MONK, GIL and the other Defendants. The evidence actually established that KENNY, MONK and GIL were working on their own, either separately or together.

The only evidence that the Appellant and MONK even knew one another was the testimony of the informant, WILLIAM CLARK (COUNTRY). COUNTRY testified that on June 29, 1976 he was sent by AGENT BURNSIDE to buy drugs from the Appellant. When COUNTRY located CODELL GRIFFIN and asked him for drugs, the Appellant said he did not have anything (App 57). When asked if he knew where drugs could be obtained, the Appellant allegedly called MONK over and informed him that COUNTRY was in the market for drugs (App 58). A dispute over the price arose and after the Appellant told COUNTRY "...it ain't my business, I am not taking your business" COUNTRY started talking price with MONK (id). MONK went to get a cab and returned 30 minutes later. COUNTRY gave the money to MONK and was handed a package (App 59).

The only evidence that CODELL GRIFFIN and KENNY knew one another was again the testimony of COUNTRY. On July 14, 1976, AGENT BLACKBURN sent the informant to look for the Appellant. CODELL GRIFFIN said he did not have any drugs and when asked if he knew anyone selling quarters, the Appellant allegedly called KENNY over (App 60). KENNY and COUNTRY bickered about quantity and price, then KENNY walked away and talked to GIL. KENNY returned and told COUNTRY "his man won't do it for \$40.00" (App 61). After further discussions between KENNY and GIL, an agreement was reached (App 62). KENNY, GIL and COUNTRY then walked into a building where the purchase was completed (App 63). As he was leaving, COUNTRY saw the Appellant down the street and complained that the quantity was not

sufficient. The Appellant replied "That's yall's business. I don't got nothing to do with it. Take care your own business!" (App 64).

Later that night, COUNTRY returned and met KENNY without involving CODELL GRIFFIN. Drugs were discussed and after speaking to GIL (App 65), KENNY told COUNTRY to walk to a building where MONK was standing (App 66). KENNY, GIL and COUNTRY entered the building, KENNY gave COUNTRY a package and KENNY received the money (App 67). The Appellant was not charged with a substantive offense from this sale.

Thus, the extent of the evidence linking KENNY or MONK with CODELL GRIFFIN and the single conspiracy charged was that the Appellant had introduced them both to COUNTRY. In both instances after the introduction, CODELL GRIFFIN told COUNTRY that he (Appellant) was not involved with and was not concerned with what took place from then on. A connection between CODELL GRIFFIN and GIL was not shown at all.

While a co-conspirator need not personally deal in or custody possess the narcotics, the Government must prove an "unlawful agreement and an overt act committed in pursuance of the agreement." United States v. Agueci 310 F2d 817, 828 (2d Cir. 1962). The fact that CODELL GRIFFIN introduced COUNTRY, an apparently willing buyer, to KENNY and MONK, willing sellers, does not imply that there was a conspiratorial agreement between KENNY, MONK and the Appellant,

United States v. Hysohion 448 F2d 343, 343 (2d Cir. 1971), and without such an agreement KENNY, MONK and CODELL GRIFFIN could not be co-conspirators. While the June 29, 1976 and July 14, 1976 sales to COUNTRY by KENNY, MONK and GIL may have been evidence of an agreement to distribute drugs on the part of KENNY, MONK and GIL, there was no evidence that this was part of a mass conspiracy involving the Appellant. KENNY, MONK and GIL delivered the drugs and they were paid the money. The Appellant had no stake in the outcome. See United States v. Chiachetti 315 F2d 584, 587-588 (2nd Cir. 1963), United States v. Steinberg 525 F2d 1126, 1134 (2nd Cir. 1975). All these introductions established was that CODELL GRIFFIN knew KENNY and MONK as well as the fact that they were in the business of selling drugs. Mere association with persons engaged in a criminal enterprise does not make one a conspirator, United States v. Cimino 321 F2d 509 (2nd Cir. 1963), nor does introducing a buyer to a seller. United States v. Hysohion, supra. Neither WILLIE GRIFFIN, ROBERT BURNSIDE OR DONNA FORTE received or expected to receive benefits from the sales by KENNY, MONK or GIL. The Appellant was not shown to be dependent in any manner on the success of the venture of KENNY, MONK or GIL. United States v. Baxter 492 F2d 150, 158 (9th Cir. 1973); United States v. Miley 513 F2d 1191 (2nd Cir. 1975).

Instead of establishing a single conspiracy among a group of people with all the members knowingly performing different functions in order to carry out the objectives of the common agreement, the Government succeeded in showing that some of the Defendants may

have worked together while others accomplished similar but independent results through a separate agreement. While the facts here are distinguishable from those in Kotteakos v. United States 328 U.S. 750 (1946), in a certain sense, the cases are similar. There, thirty-two (32) Defendants were charged with a single conspiracy to obtain Government loans based on fraudulent information. The evidence established that the Defendants had individually transacted business with one person to obtain the loans but that the Defendants had no relationships with one another. The Court found that the proof made out a case, not of a single conspiracy, but of several.

In Kotteakos, supra:

...(N)o two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single overall, comprehensive plan. Blumenthal v. United States 332 U.S. 539, 558 (1947).

United States v. Goss 329 F2d 180 (4th Cir. 1964), United States v. Johnson 515 F2d 730 (7th Cir. 1975), and United States v.

Bertolotti 529 F2d 149 (2nd Cir. 1975) are just a few of the many recent cases that have followed Kotteakos, supra.

As in United States v. Miley, supra, KENNY, MONK and GIL were members of a separate group, but unlike Miley they had no criminal dealings with the single conspiracy charged in the Indictment. As in United States v. Bertolotti, supra, while the transactions involving KENNY, GIL and MONK could have been found to have taken place, there was nothing linking them to CODELL GRIFFIN or the other members of the single conspiracy alleged. Taken in the light most favorable to the Government, the evidence of the single conspiracy charged is insufficient to support the Jury verdict.

VI

THE VARIANCE BETWEEN THE SINGLE CONSPIRACY CHARGED AND THE MULTIPLE CONSPIRACIES SHOWN PREJUDICED CODELL GRIFFIN'S SUBSTANTIAL RIGHTS AND REQUIRES REVERSAL OF HIS CONVICTIONS.

While there was evidence of at least two (2) or three (3) separate conspiracies, one (1) or two (2) of which were composed of KENNY, MONK and GIL, their out-of-court statements as well as their actions were erroneously held to be admissible against the Appellant. Mere association with a conspirator is insufficient to establish the requisite degree of participation in a conspiratorial venture, nor does it provide a sufficient basis for the admission of hearsay statements of alleged co-conspirators. United States v. Ragland 375 F2d 471, 477 (2d Cir. 1967). Declarations by co-conspirators are admissible under the conspiracy exception to the Hearsay Rule only if they are made in furtherance of the conspiracy charged in the Indictment. Paoli v. United States 344 U.S. 232 (1957); United States v. Rodriguez 509 F2d 1343, 1436 (5th Cir. 1975).

For the same reasons the drugs sold to the informants by KENNY, MONK and GIL were erroneously admitted against CODELL GRIFFIN. This was especially harmful in that the drugs sold by MONK on June 29, 1976 and by KENNY on two (2) occasions on July 14, 1976, Counts XII and XIII of the Indictment, constituted a majority of the hard evidence produced at trial. Other drugs allegedly purchased or sold in 1974 and 1975 by members of the group

labeled the "CODELL GRIFFIN CONSPIRACY" were not introduced into evidence. The Jury completely rejected the uncorroborated testimony of the informants and accomplices on those transactions as CODELL GRIFFIN was acquitted of those substantive charges in Counts III, IV, V, VI and VIII (App 68).

Where an Indictment charges a single conspiracy but the proofs show several different conspiracies in which some of the Defendants were not involved, there is a variance between the Indictment and the proofs as to those Defendants. Cannella v. United States 157 F2d 470 (9th Cir. 1946); Rocha v. United States 288 F2d 545 (9th Cir. 1961).

At least one Court has held that a conviction for a single conspiracy cannot be upheld when such a variance exists, Tinsley v. United States 43 F2d 890 (8th Cir. 1930), but the law is presently such that a variance is not fatal unless it affects the substantial rights of the accused. Cannella v. United States, supra.

In Cannella, supra, numerous Defendants were convicted of participating in one conspiracy to defraud the Government when there were in fact five (5) separate conspiracies, revolving around one key individual, involving at least twelve (12) persons. The Court held that even though the Defendants were conspirators, and even though they could have been convicted in separate trials or in one trial with an Indictment containing separate counts, their convictions would be reversed since it was "highly probable that the error (of mass trial) had substantial and injurious

effects or influence on determining the jury's verdict."

In Daily v. United States 282 F2d 818 (9th Cir. 1960), sixteen (16) persons were charged with forming one conspiracy to violate Federal Narcotics Laws and at least three (3) separate conspiracies were proved. Under these circumstances, the conviction of the Defendant who was not found to have participated in each of these separate plans was reversed.

...A prejudicial burden was placed on the defense...not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other Defendants to prevent its transference as "harmless error" or by psychological effect, in spite of instructions for keeping separate transactions separate. (Emphasis added, citations omitted) Daily, supra, at 822.

In language that is just as applicable to the case at bar the Supreme Court in Kotteakos v. United States, supra, has expressed its view of when a variance is prejudicial.

The indictment charged a single conspiracy only; the proof showed more than one; the instructions told the jury erroneously that on the evidence they could find the defendants guilty of a single confederation; must find that each defendant joined it, in order to convict; must consider the evidence as to each separately on this phase; but, once satisfied concerning that, could attribute to each one found to be a member any act done by any other co-conspirator in furtherance of "the scheme" as an overt act, again in obvious error; and in neither case, of course, was there precaution to keep separate conspiracies separate.

We do not think that either Congress, when it enacted §269 or this Court when deciding the Berger case (Berger v. United States 295 U.S. 78, 79, 55 S. Ct. 629, 79 L. Ed. 1314) intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all.

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth. Kotteakos, supra, at 772,772.

The Defendants charged in the case at bar with participating in a single conspiracy were not shown to have shared a "single unified purpose." Instead, KENNY, MONK and GIL were bent on dealing for themselves in a manner that in no way connected them with the scheme of the other Defendants. Even so, the Jury was instructed that CODELL GRIFFIN could be convicted as the leader of the one conspiracy charged based on the declarations of KENNY, MONK and GIL, as well as on the drugs they sold. Thus, the Appellant was exposed to the risk that the unshared guilt of those others would be transferred to him and used to find the single conspiracy charged.

The fact that two (2) or three (3) conspiracies were proven here rather than the large number that existed in Kotteakos v.

United States, supra, does not mean that the resulting prejudice was harmless. In United States v. Johnson, 515 F2d 730 (7th Cir. 1975), the Defendants were convicted as members of single conspiracy to dispose of stolen cards when two such conspiracies existed between different people. The Seventh Circuit refused to interpret Kotteakos as treating every two conspiracy variance as harmless error and reversed the convictions because of the prejudice that had developed.

United States v. Russano, 257 F2d 712 (2d Cir 1958), also involved a two-conspiracy variance. While the Defendants were prosecuted for a single narcotics conspiracy continuing from 1951-1957, two separate conspiracies in 1952 and 1955-1956 were established. The Second Circuit ruled that this was a prejudicial variance requiring reversal.

The Government does not deny that if the evidence failed to establish a single conspiracy, but established the existence of two conspiracies, one in 1952 and another in 1955-1956, the appellants were prejudiced thereby. Nor could it be otherwise. If appellants had been tried only for the 1952 conspiracy, the admission of evidence relating to the later conspiracy of 1955-56 would have constituted prejudicial error. Similarly, if they had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial.

In the present case, there is not only an absence of evidence indicating a continuing conspiracy, but also an absence of evidence indicating that these two appellants were members of any conspiracy that was in existence during 1953 and 1954. The evidence

that does appear in the record tends to indicate that two of the alleged co-conspirators in the alleged 1952 conspiracy, including the defendant Universita, were out of the narcotics business for at least the two years 1953-1954. Under these circumstances, we believe that a prejudicial variance exists between the proof and the indictment. Russano, supra, at 715, 716.

Under the guise of a single conspiracy, the Government subjected the Appellant to testimony and evidence relating to at least three (3) unconnected crimes and prejudicial hearsay from unrelated conspiracies. Under these circumstances, there is a significant probability that this "mass trial" exposed CODELL GRIFFIN to the risk that the guilt of other Defendants would "spill over," and the danger that the Jury would convict him not on the evidence relating to him, but by imputing to him guilt based on the activities of the other set of conspirators, KENNY, MONK and GIL. It is not the number of conspiracies proven that controls whether a variance is prejudicial, United States v. Bertolotti, supra, at 156, but the nature of the evidence produced. The conspiracies shown here were unrelated to one another and could not be charged in the same Indictment under Rule 8(a) of the Federal Rules of Criminal Procedure. The members of one conspiracy were not involved in the others and the evidence of a separate conspiracy would not be admissible to show intent or motive. Proof of a chain conspiracy was not produced as it was in United States v. Sperling 506 F2d 1323 (2d Cir. 1974) or United States v. Tramunti 513 F2d 1087 (2d Cir. 1975), and the single conspiracy charged was not shown to exist.

Since the Indictment charged one overall conspiracy and the proof showed smaller ones, there was a material variance. Because it cannot be said that this variance had no influence on Jury's verdict, the convictions of the Appellant must be reversed.

United States v. Bertolotti, supra, at 158. As a matter of law, the Government did not establish the single conspiracy charged beyond a reasonable doubt. Where one conspiracy is specifically charged, proof of different ones will not sustain a conviction.

United States v. Bostic 480 F2d 965, 968 (6th Cir. 1973).

VII

THE INSTRUCTIONS ON CONSPIRACY WERE
ERRONEOUS AND EXTREMELY PREJUDICIAL

The charge to the Jury on conspiracy, in pertinent part, is contained at pp. 2430 to 2441 of the Transcript. In these instructions the Court gave the statutory definition of conspiracy and informed the Jury of the elements of the crime (App 69), and the Jury was told that they had to find beyond a reasonable doubt that CODELL GRIFFIN had a continuing agreement with others to possess and distribute heroin (App 70). The Court charged that the single conspiracy contained in the Indictment had to be found (id) but it did not explain the difference between a single conspiracy and separate conspiracies with similar objectives. The Jury was impliedly instructed that it would be justified in finding that CODELL GRIFFIN participated in a single conspiracy beyond a reasonable doubt from the evidence presented (App 71). In the event the Appellant was found guilty, the Jury was then instructed in considering the guilt or innocence of the other Defendants of the crime of conspiracy (App. 72). From these instructions, the Jurors had the opportunity and the direction to find that CODELL GRIFFIN conspired with all the remaining Defendants and unindicted conspirators in one mass conspiracy.

- A) IT WAS PLAIN ERROR FOR THE COURT TO FAIL
TO INSTRUCT THAT THE JUNE 29, 1976 AND
JULY 14, 1976 TRANSACTIONS BETWEEN COUNTRY,
MONK, KENNY AND GIL COULD NOT BE CONSIDERED
EITHER AS PROOF OF THE CONSPIRACY CHARGED
OR AS EVIDENCE OF CODELL GRIFFIN'S INVOLVE-
MENT IN THAT CONSPIRACY.

Although the evidence proved that one or two conspiracies entirely unrelated to that charged existed through KENNY, MONK and GIL, Argument V, supra, the Court was of the opinion that a single continuous conspiracy had been proven. The Jury was instructed in a manner that permitted it to consider the actions of KENNY, MONK and GIL on June 29, 1976 and July 14, 1976, as well as drugs obtained from those transactions, as proof of the conspiracy charged and that the Appellant headed that mass conspiracy.

It was plain error under Rule 52(b) of the Federal Rules of Criminal Procedure for the Court not to instruct the Jury that the testimony and evidence relating to KENNY, MONK and GIL on June 29, 1976 and July 14, 1976 could not be used to find the conspiracy charged or the participation of the Appellant in that conspiracy. That the Jury acquitted KENNY and MONK of conspiracy makes this error even more plain.

In Kotteakos v. United States, supra, the Trial Court was of the view that one conspiracy had been made out and that it was possible for the Jury to conclude from the similarity of the Defendants actions that all were involved in a common scheme. The Supreme Court ruled that the instructions given under this theory were erroneous since separate conspiracies had actually been proven.

"The court here was careful to caution the jury to consider each defendant's case separately, in determining his participation in

'the scheme' charged. But this obviously does not, and could not, go to keeping distinct conspiracies distinct, in view of the court's conception of the case.

Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that if the jury found a conspiracy, then the acts or the statements of any of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against all of the defendants whom you so find to be members of the conspiracy." The instructions in this phase also declared:

"It is not necessary, as a matter of law, that an overt act be charged against each defendant. It is sufficient if the conspiracy be established and the defendant be found to be a member of the conspiracy -- it is sufficient to allege overt acts on the part of any others who may have been members of the conspiracy, if those acts were done in furtherance of and for the purpose of accomplishing the conspiracy. On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. ...we do not understand how it can be concluded, in the fact of the instruction, that the jury considered and was influenced by nothing else." (emphasis added). Kotteakos, supra, at 769-771.

In United States v. Johnson 515 F2d 730 (7th Cir. 1975), the Defendants were prosecuted for a single conspiracy but several were shown. The Seventh Circuit ruled that it was plain error to fail to instruct the Jury that the evidence of the separate conspiracies could not be considered against the Defendants who had not participated in them.

"When the possibility of a variance appears, the District Judge should instruct the jury on multiple conspiracies. But, where, at the close of testimony, it is clear, as here, that a jury could not find a single overall conspiracy as a matter of law, the defendant is not only entitled to a multiple conspiracies instruction but also to an instruction that evidence relating to the other conspiracy or conspiracies disclosed may not be used against him under any circumstances." (citations omitted) Johnson, supra, at note 10, 733-734.

JUDGE KNAPP was clearly of the opinion that a single continuing conspiracy existed and the instructions reflected this position. In actuality, the single continuing conspiracy charged was not proven as a matter of law. Argument V, supra. The Jury was told to consider the individual participation of each Defendant but that was not sufficient to keep "distinct conspiracies distinct, in view of the Court's conception of the case." This is particularly true here where the Juror's attention was first focused on CODELL GRIFFIN ahead of all the other Defendants. The sales by KENNY, MONK and GIL and the drugs from those sales were alleged to be overt acts and the drugs were admitted against the Appellant even though there was no conspiratorial association between the parties. The drugs from these transactions were particularly harmful in that they composed the great majority of the hard evidence admitted during a trial where the Jury had rejected the testimony of other transactions by informers and unindicted co-conspirators that were not corroborated by the drugs allegedly purchased or sold at those times. With the drugs from the June 29, 1976 and July 14, 1976 transactions, which should not have been used against CODELL GRIFFIN, the Jury most likely would

not have found the Appellant to be the mastermind of the conspiracy charged in Count I. The same effects and consequences that demanded reversal in Kotteakos, supra, and Johnson, supra, should be found to have prejudiced CODELL GRIFFIN and to require a reversal in the case at bar.

B) THE INSTRUCTIONS ON SINGLE VERSUS MULTIPLE CONSPIRACIES WAS INADEQUATE IN THAT THEY WERE INCOMPLETE, CONFUSING AND UNCLEAR.

Whether there is one conspiracy or several between various Defendants is primarily a Jury question since it is a question of fact as to the nature of the agreement between the parties. United States v. Crosby 294 F2d 928 (2d Cir. 1961); United States v. Dardi 330 F2d 316 (2d Cir. 1964). This being so, where there is the possibility of a variance between the conspiracy charged and the proofs, the Jury should be instructed on multiple conspiracies. United States v. Varelli 407 F2d 735, 745 (7th Cir. 1969); United States v. Johnson, supra, at 733-734 N.10.

Even if the evidence here was such that the Jury could find a single conspiracy between all the Defendants it is also true that there was more than a reasonable possibility that if they had been properly instructed the Jury could have found that more than one conspiracy had been proven. The instructions given were erroneous and prejudicial because: The Jury was not specifically instructed that any Defendant not shown beyond a reasonable doubt to be a member of the single continuing conspiracy charged must be acquitted even

though other conspiracies may have been shown, United States v. Calabro 449 F2d 885, 894 (2d Cr. 1971); the Jury was not informed that evidence of a separate conspiracy in which a Defendant had not participated could not be used against him; the Jury was not given any meaningful criterion for differentiating between one conspiracy and many separate conspiracies of a similar nature, and; because the Court failed to marshall the evidence of the possibly separate conspiracies. Here, there was more than just the possibility that a variance could be found. Based on the proofs, and if the jury had been properly instructed in this regard, the Jurors could reasonably have concluded that KENNY, MONK and GIL were members of a completely different conspiracy than that charged in the Indictment and that they had no common agreement with CODELL GRIFFIN or his alleged conspirators. Where the evidence is ambiguous as to the scope of the agreement and the issue has practical importance, the Court must focus the Jury's attention on that issue. United States v. Borelli 336 F2d 376, 386 N.4 (2d Cir. 1964). JUDGE KNAPP gave no such instruction.

United States v. Kelly 349 F2d 740 (2d Cir. 1965) also dealt with erroneous jury instructions. The Appeals Court there held that it was reversible error for the Trial Court to have failed to marshall the proofs in such a fashion as to place clearly before the Jury the difference between the evidence against the Defendants. This would also appear to be a particular significance when one conspiracy is charged and there is a serious question of whether the

evidence against each Defendant connects him with either that single plan or with his co-Defendants. JUDGE KNAPP likewise failed to separate the evidence against KENNY, MONK and GIL that could not be used against CODELL GRIFFIN if a separate conspiracy was found to exist.

In United States v. Griffin 464 F2d 1352 (9th Cir. 1972), multiple conspiracies had been shown although only one had been charged. The Ninth Circuit found that no prejudice resulted from this variance because of the fact that the Trial Judge had followed United States v. Varelli, supra, and given a cautionary instruction to the Jury that differentiated between conspiracies. The instruction given was set out at 1357.

Now, suppose--just because I don't know what your findings are going to be--but suppose that you do not find that the government has proven beyond a reasonable doubt the defendants Montano and Griffin were a part of the same single overall conspiracy. I don't know whether you can find that or not. That, of course, is your determination. There is an alternate area of the law that I wish to call to your attention and that has to do with the individual conspiracies that may be found in this indictment.

If you do not find beyond a reasonable doubt that the defendant Montano conspired with defendant Griffin--that is they were in the same and single conspiracy--but find that the defendant Montano did conspire with a Lorenzo Rodriquez and or Maria Bueno and or with others you may, if the evidence so convinces you beyond a reasonable doubt, find defendant Montano guilty of the conspiracy. However, under this circumstance--to which I'm just making reference--you cannot consider any evidence except that which was admitted against defendant Montano. Likewise if you do not find beyond a reasonable doubt that defendant Griffin conspired with defendant Montano in one single overall conspiracy, but find that the defendant Griffin did conspire with Lorenzo Rodriquez and/or Maria Bueno or with others you may, if the evidence so convinces you beyond a reasonable doubt, find the defendant Griffin guilty of conspiracy.

A similar multiple conspiracy instruction was approved by this Circuit in United States v. Tramunti 513 F2d 1098 (2nd Cir. 1975).

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy. Tramunti, supra, at 1107.

The Traumunti Court felt that the above charge was correct because with the additional instruction that:

In determining whether any defendant was a party, each is entitled to individual consideration of the proof respecting him or her, including any evidence of his or her knowledge or lack of knowledge, his or her status, his or her participation in key conversations, his or her participation in the plan, scheme or arrangements alleged,

and by marshalling the evidence as to each Defendant:

...it was clear to the jury that acquittal was required if there was insufficient proof of participation in the "single overall conspiracy" charged. Tramunti, supra, at 1107.

Here, the multiple conspiracy instruction was limited to the statement that the Defendants could not be convicted if the conspiracy charged was not shown. The multiple conspiracy instructions in the case at Bar failed to even approach those in Griffin, supra, and Tramunti, supra. The Court did not explain how a separate conspiracy could be found nor did it instruct that evidence of separate conspiracies, not including the overall conspiracy charged, could not be used to show a single conspiracy and could not be considered as evidence against those Defendants not found to be members of that conspiracy.

If the Jury had been properly informed of the distinction between one mass conspiracy and several distinct conspiracies, if it had been meaningfully instructed of the duty to acquit when the conspiracy charged was not shown, and if the Court had marshalled the proofs relating to each Defendant, particularly that against KENNY, MONK and GIL, it would have not been unreasonable for the Jurors to have concluded that KENNY, MONK and GIL were operating independently and not as part of a mass conspiracy headed by CODELL GRIFFIN.

Instead of being given some meaningful criterion for determining single versus multiple conspiracies, the instructions to the Jury permitted them to confuse "the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventurers of like character" and allowed the Jury to find a single conspiracy from and to bind the Appellant by the acts and declarations

of KENNY, MONK and GIL without first being able to intelligently determine whether all the parties involved were participating in a single common plan or off on independent adventures. It cannot reasonably be said with any degree of certainty that the erroneous instructions did not result in a "transference of guilt" to the Appellant and contribute to his conviction, particularly when KENNY and MONK were acquitted of conspiracy, when the drugs sold by KENNY, MONK and GIL constituted a large part of the drugs admitted at trial and when the Jury obviously rejected similar testimony of other informers and unindicted co-conspirators not supported by such evidence

- C) IT WAS ERROR TO FAIL TO INSTRUCT THE JURY THAT THE EVIDENCE ON THE APPELLANT'S ACTIVITIES FROM 1967 THROUGH 1969 COULD NOT BE CONSIDERED AS PROOF OF THE CONSPIRACY CHARGED OR AS PROOF OF THE APPELLANT'S PARTICIPATION IN THAT CONSPIRACY.

The Indictment alleged that the Appellant headed a single continuing conspiracy from September, 1971 to the date of the Indictment. The Court permitted an informant to testify that he and the Appellant had dealt in drugs from 1967-1969. Other than CODELL GRIFFIN and the informant, COUNTRY, none of the individuals alleged to have been selling drugs from 1967-1969 were on trial, nor were they named as unindicted co-conspirators. Although the Government contended that the Appellant's activities from 1967-1969 were part

of the same conspiracy charged in the Indictment, there was no proof of such an ongoing conspiracy. Other than evidence of a 1971 conviction for drug possession, it was not until 1974 that the Appellant allegedly again bought or sold drugs. The Appellant, the other Defendants and the unindicted conspirators who were shown to have had any relationship at all had no such relationship until late 1975 or early 1976. Argument IV supra.

In the event it was otherwise proper to admit evidence of the Appellant's bad acts in 1967-1969, it was error not to put that evidence in proper perspective. In United States v. Stassi, supra, evidence of narcotics related transactions outside the dates charged in the Indictment was held not to be error because the Court had repeatedly emphasized that the disputed testimony was being admitted for the limited purpose of establishing the association of the parties. The Court in Stassi also instructed the Jury that the Defendants were being tried only for the conspiracy charged and that if the Jurors had a reasonable doubt as to the Defendants' guilt, they were to acquit, even though they were "dead certain" that the Defendants had committed some other crime.

Unlike Stassi, supra, that Court here did not correctly charge the Jury on the limited purpose to which the evidence of the 1967-1969 drug transactions could be put. The Jury was not adequately told that the evidence could only be considered as bearing on the intent of the Appellant, to show the background of the conspiracy charged or the participation of the Appellant in that

conspiracy. Without such a limiting instruction, the Jury was free to consider the 1967-1969 evidence as direct proof of a conspiracy beginning in and continuing from 1967 until the time of the Indictment and as proof of the Appellant's criminal disposition and the likelihood that he was guilty of the instant charges. The Jury being allowed to give the disputed testimony unwarranted weight as well as an improper purpose, the instructions were prejudicial to the Appellant.

VIII

IT WAS REVERSIBLE ERROR FOR THE COURT TO HAVE DENIED THE MOTION FOR ACQUITTAL ON COUNT II AND TO HAVE SUBMITTED THE EVIDENCE ON THAT COUNT TO THE JURY.

A) CODELL GRIFFIN WAS NOT SHOWN TO HAVE OCCUPIED A POSITION OF ORGANIZER, A SUPERVISORY POSITION, OR ANY OTHER POSITION OF MANAGEMENT OVER FIVE (5) OR MORE PERSONS.

21 U.S.C. §848(b)(2)(A) limits the application of the statute to those who commit a continuing series of violations in violation of Title 21 which was undertaken in concert with five (5) or more other persons with respect to whom the Defendant occupies a position of organizer, a supervisory position, or any other position of management. While the Defendant need not organize, supervise or manage five (5) or more people at the same moment, he must occupy "a position of organizer, a supervisory position or any other position of management. United States v. Sperling 506 F2d 1323, 1343 (2d Cir. 1974). Section 848 is aimed at the business of trafficking in drugs on a continuing, substantial and supervisory basis. United States v. Manfredi 488 F2d 588, 602 (2d Cir. 1973). At the close of the Government's case, CODELL GRIFFIN was not shown to have had this managerial or supervisory position over five (5) or more persons.

BILL GRIFFIN and ROY are the only individuals shown by the evidence to have been under any type of continuing direction or control by the Appellant. DICKY DIAMOND and TIM are people whose names

arose on only a single occasion. Their role in any continuing scheme was undefined and they participated in only one unsuccessful transaction (App 73). All the other individuals named at trial as having dealings with CODELL GRIFFIN were either involved prior to the effective date of the statute, May 1, 1971, or they were independent entrepreneurs who merely purchased drugs with "no strings attached." While purchasing drugs by itself may be sufficient to find that the seller and the purchaser conspired to distribute those drugs or to possess them with the intent to distribute, it does not make the purchaser an employee or agent of the seller within the meaning of Section 848 unless the proofs disclose that the purchasers' eventual distribution to others was under the direction, control or supervision of the seller.

Those who became involved in this case after May 1, 1971, the effective date of the statute, who were either never connected to the Appellant or who did nothing more than sell drugs to or buy drugs from the Appellant were "KID," "GATOR," "GYPSY," "RICO," (App 74) "BUBBY," "REAL THING" (App 75), LEANDER CLARK (App 76), WILLIAM CLARK (COUNTRY) (App 77) and DONNA FORTE (App 78).

Before he became an informant in February, 1976, "KID" sold drugs on 116th Street for his brother, "GYPSY," along with "GATOR" and "RICO." Other than receiving drugs from BILL or ROY they were free to operate independently and according to their own guidelines. None of these people took orders from or followed the directives of

CODELL GRIFFIN, BILL GRIFFIN or ROY relative to the operation of the drug business on 116th Street. They could sell drugs to anyone and at any price they wanted.

Other than their offering to sell drugs on 116th Street, the evidence failed to disclose that "BUBBY" and "REAL THING" had any relationship at all with the Appellant.

WILLIAM CLARK became a Government informant in 1969 and could not be considered to be acting in concert with the Appellant within the timespan of the crimes charged in the Indictment.

LEANDER CLARK sold drugs to the Appellant in 1974 and purchased drugs from him in 1975. In 1974, LEANDER CLARK was selling drugs to anyone with the money to purchase them and regarded the Appellant as just another purchaser rather than as a manager. Whenever LEANDER CLARK obtained his drugs from the Appellant in 1975, he was free to go wherever and to sell to whomever he wished without any inference or supervision from the Appellant.

DONNA FORTE acted on the behalf of LEANDER CLARK not CODELL GRIFFIN. Other than obtaining drugs from the Appellant for CLARK she had nothing to do with CODELL GRIFFIN. She delivered and sold drugs for CLARK not the Appellant.

To establish a violation of Section 848, the Government was required to prove that CODELL GRIFFIN occupied a managerial or supervisory position with respect to a continuing narcotics trafficking operation in concert with five (5) or more other persons. United States v. Sisca 503 F2d 1337, 1345 (2d Cir. 1974). Since the

evidence at the close of the Government's case was insufficient for the Jury to find this necessary element beyond a reasonable doubt, Glasser v United States 315 U.S. 60, 80 (1942), the Court erred in denying Appellant's Motion for Acquittal on Count II (App 79).

B) BECAUSE THE MOTION FOR ACQUITTAL ON COUNT II WAS IMPROPERLY DENIED, THE JURY WAS ALLOWED TO CONSIDER PREJUDICIAL EVIDENCE THAT WAS IRRELEVANT TO THE REMAINING CHARGES.

After the Government had introduced what it felt was proof of the conspiracy charged in Count I, the theory of the Government's case relating to Count II was that the "defendant expended substantial sums of money on specific purchases" which it intended to introduce proof of (App 80). A number of the purchases and assets to be shown were those pertaining to MS. GRIFFIN and the Government argued that since the wife filed no Income Tax Return and was on welfare that meant that CODELL GRIFFIN was the sole source of her income (App 81-82).

As a result, the Jury was informed that MS. GRIFFIN: brought a couch for \$1,134.00 (App 83); paid \$285.00 rent per month (App 84-85); bought a color television (App 86); bought a Mercedes-Benz for \$20,000 (App 87); ordered a \$7,000.00 Audi (App 88); bought a Lincoln Continental (App 89); and maintained her own bank account (App 90).

When the Government expressed its intention to introduce proof that MS. GRIFFIN was on welfare (App 91-92), the defense objected on the grounds that it was prejudicial (id), would implicate CODELL GRIFFIN and his wife in the additional crimes of welfare fraud (App 93-94), and did not establish that MS. GRIFFIN had no independent source of income but only that she had lied on the welfare application. The Court advised defense counsel that unless he stipulated to the facts the Government wished to prove the objectionable material would be admitted (App 95). Choosing the lesser of two evils, defense counsel stipulated that MS. GRIFFIN was entirely dependent on the Appellant for support, having no income or assets of her own (App 96).

Continuing in its effort to prove that CODELL GRIFFIN had derived substantial profits within the meaning of Section 848 evidence was presented that: he maintained a bank account with JACQUELINE MARTIN (App 97); JACQUELINE MARTIN owned a boutique in which he was a partner (App 100) and which he had paid for (App 101); he was an officer in various corporations he had set up (App 102-103); and that he was a partner in a housing association in which he had invested (App 104). In addition, the Appellant's Income Tax Returns from 1970 through 1975 were introduced (App 105-115).

In his closing argument, the Prosecutor lumped all this evidence together, attributed it all to CODELL GRIFFIN and argued that substantial profit had been shown (App 116-128).

Thus, to make its case under 21 U.S.C. §848, the Government produced evidence of the Appellant's assets as well as the purchases and assets of his wife. Other than the coerced stipulation that CODELL GRIFFIN provided all of the support for his wife there was absolutely no proof that he was the source of her money.

Ordinarily, stipulations entered into freely and fairly are binding on the parties. Henry v. C.I.R. 362 F2d 640, 643 (5th Cir. 1966), Fenix v. Finch 436 F2d 831, 837 (8th Cir. 1971). Conversely, stipulations that are involuntary and the produce of coercion should be set aside by the reviewing Court. CODELL GRIFFIN contends that the stipulation that he was the sole source of income for his wife was involuntary and a product of coercion in that it was the only means of avoiding the erroneous ruling of the District Judge that prejudicial evidence of welfare fraud on the part of himself and his wife could be admitted if he did not so stipulate. With no independent proof that he was the sole source of income for his wife evidence of MS. GRIFFIN's assets and purchases was irrelevant and immaterial to the charges against him as his wife was not charged as a conspirator or with any other crime. In none of the cases discussing 21 U.S.C. §848; United States v. Sperling, supra; United States v. Manfredi, supra; or United States v. Sisca, supra; has such an approach to establishing substantial profits been approved.

At the close of the Government's case, the Court should have entered a Judgment of Acquittal on Count II, Argument VIII(A), supra,

and instructed the Jury to disregard all the evidence relating to that charge. Instead, the Jury was allowed to consider the Appellant's wealth as well as the totally unconnected evidence of his wife's assets which had no bearing at all on the elements of the remaining charges. Even though there was a strong indication that gambling rather than drugs was the sources of the Appellant's wealth (T. 1635, 1917-1926) (App 129-135), and even though these proofs were found to be insufficient to convict CODELL GRIFFIN on Count II, it cannot be said beyond a reasonable doubt that the Jurors did not improperly consider the evidence relating to Count II, which was never directly tied either to narcotics transactions or to any of the other Defendants or alleged conspirators, as proof of the substantive offenses, the conspiracy and of the Appellant's guilt of those crimes. As the Jurors were never instructed in this regard and the convictions on Counts I, IX, XI and XII resulted from an erroneous application of that evidence, the convictions must be reversed.

IX

THE CAUSE MUST BE REMANDED FOR RE-
SENTENCING.

- A) IN THE EVENT ANY OF CODELL GRIFFIN'S
CONVICTIONS ARE REVERSED, RESENTEN-
CING IS CALLED FOR.

CODELL GRIFFIN was convicted of conspiracy to distribute heroin and three (3) substantive Counts of distribution. The Court sentenced the Appellant to fifteen (15) years on each Count, the terms to run concurrently, with special parole of an additional five (5) years (App 136).

CODELL GRIFFIN contends that the convictions for conspiracy and the substantive offenses were improper and must be reversed. Accordingly, since the Appellant received concurrent sentences on the four (4) Counts and since the fact of conviction on the Counts that are reversed most likely affected the sentences imposed for each, the cause must be remanded for reconsideration of sentencing. United States v. Sperling, supra, at 1343, and cases cited therein.

- B) IT WAS ERROR TO SENTENCE THE APPELLANT
UPON INFORMATION PROVIDED BY THE
GOVERNMENT WITHOUT ALLOWING HIM ADE-
QUATE TIME TO REVIEW THE SAME AND PRE-
PARE A REBUTTAL.

At the time of sentencing, the Prosecutor reviewed what he purported to be the evidence against the Appellant. The Government then provided the Court with information on sentences handed down in

other drug cases (App 137) and encouraged the Court to rely on these statistics when sentencing CODELL GRIFFIN (App 138). The documents apparently consisted of a notice from the Prosecutor's Office concerning sentences handed down in the Southern District (App 139) as well as a statistical survey of sentences that had been prepared for another case (App 140). Up until this time, defense counsel had only seen the Probation Report (id) and was unaware that any information had been submitted to the Court with respect to sentences handed out in other cases (App 141). The Court clearly was aware of both these documents (Op Cit). The Judge expressed an inability to understand one of the documents (App 142) but admitted having read other and that it may have affected his decision (id). There were approximately twenty (20) pages of information in this latter document and when defense counsel requested time to review it he was not permitted an opportunity to do so (id).

From the above facts, it is evident that the sentence imposed on CODELL GRIFFIN was based at least partially on some information provided by the Government which was not disclosed to defense counsel until the time of sentencing. The Court admitted that the information may have influenced the sentence imposed here, but when the defense requested an opportunity to familiarize himself with the material he was not permitted to do so. Since this material related to the sentences imposed in other drug cases, the Prosecutor was arguing that CODELL GRIFFIN should be treated harshly, and the Appellant received fifteen (15) years the information cannot be said to have had no effect on the sentence imposed or to have been favorable to the Appellant.

Rule 32(A) and (B) of the Federal Rules of Criminal Procedure provide that the Defendant should be permitted to review the Presentence Report and be afforded an opportunity to comment thereon, except for information that is privileged or confidential. Defense counsel here had read the Presentence Report but was not given the information in question until the time of sentencing and had no opportunity to respond to it.

In United States v. Perri 513 F2d 572 (9th Cir. 1975), the Ninth Circuit held that it was error to deny the Defendant access to or an opportunity to rebut information upon which the sentencing Judge had referred. The same decision was also reached in United States v. Read 534 F2d 858 (9th Cir. 1976). See also, Shelton v. United States 497 F2d 156 (6th Cir. 1974).

The facts here are admittedly unlike those in either Perri, supra, or Read, supra, but constitute error according to United States v. Rosner 485 F2d 1213 (2d Cir. 1973). In Rosner, as in the case at bar, the Government had provided the Court with information that was not turned over to the defense until the time of sentencing, the Government argued that the Defendant should be treated harshly, and the defense was denied an opportunity to be able to reply to the information the Government had prepared. The Second Circuit read Rule 32(A) as giving the Defendant not only "the right to make a statement on his own behalf" but also "to present any information in mitigation of punishment." Rosner at 1230. Since the Memorandum in Rosner had been prepared by the Prosecutor, not a "professional neutral," and was one-sided, the Defendant has been seen as being entitled

to sufficient time to prepare a rebuttal to the Memorandum. As the Defendant in Rosner had not been given this opportunity, the sentence was vacated and the case was remanded for resentencing.

The Memorandums in the instant case were prepared by the Government and CODELL GRIFFIN should have been provided with sufficient time to prepare a rebuttal to the arguments contained therein. For the reasons stated above, Appellant's sentence must be vacated and the case remanded for resentencing, or in the alternative, an evidentiary hearing should be held to determine the reliance placed on the information by the District Judge when imposing sentence.

- C) THE DISTRICT JUDGE ABUSED HIS DISCRETION BY IMPOSING SENTENCE PURSUANT TO SENTENCES IMPOSED IN OTHER UNRELATED CASES WITH THE PURPOSE OF DETERRING THE GENERAL PUBLIC RATHER THAN CONSIDERING APPELLANT'S CASE INDIVIDUALLY.

The Government provided the Court with information on sentences imposed in other similar cases and the Court admitted that it "may have affected" him "one way or another." Argument IX(B), supra. After discussing the case sentence was imposed on Appellant as follows:

I am faced with what my sentence says to the community about the conduct which you have been engaged in and that, it seems to me, has to be paramount in this situation. In the light of that I can't see giving you less than I am going to give you.

It's the judgment of the court that on each of the counts of which you have been convicted you serve a term of 15 years, the terms to run concurrently, special parole of an additional five years. (Sentencing Transcript at 33-34) (Emphasis added)

Thus, from the above language, the effect that the sentence would have in deterring others from similar conduct was the "paramount" factor that the District Judge considered when deciding the sentence to be imposed on the Appellant. The sentence was not based on the individualized record of CODELL GRIFFIN but upon the category of the crime and primarily on considerations of general deterrence.

While it may be the general rule that a Court of Appeals may not reverse a sentence that is within legal limits, exceptions to that rule exist where a sentencing court considered improper factors, McGee v. United States 462 F2d 243 (2d Cir. 1972) or where a District Judge failed to exercise his discretion by sentencing in accordance with a uniform policy or by category of crime rather than by individualized considerations. United States v. Brown 470 F2d 285 (2d Cir. 1972); United States v. Hartford 489 F2d 652 (5th Cir. 1974); Williams v. Oklahoma 358 U.S. 576, 585 (1959). In United States v. Schwarz 500 F2d 1350 (2d Cir. 1974) the District Judge was found to have employed a "fixed and mechanical" approach to sentencing by denying a Defendant treatment under the Youth Corrections Act because of her intelligence and privileged background.

A sentence should be suited to a Defendant's particular character and potential for rehabilitation. Greg v. United States 394 U.S. 489, 492 (1969). It is the "modern philosophy of penology that the sentence should fit the offense and not merely the crime. King v. United States 410 F2d 1127, 1128 (9th Cir. 1969).

The District Judge here placed primary emphasis on the effect the sentence he imposed would have on the community. While general deterrence may not be improper as a factor, it should not override individual considerations and become the factor in determining sentence. The Court's consideration of sentences imposed in completely unrelated cases in fixing the Appellant's sentence only compounded this error. Any kind of mechanical sentencing that ignores individual differences is to be avoided, United States v. Baker 487 F2d 360 (2d Cir. 1973), and the procedure followed by the Court in this case in deciding the sentence to be imposed violated this rule as well as those mentioned above.

CONCLUSION

The most damaging evidence against CODELL GRIFFIN came from two Government informants, "COUNTRY" and "KID," who had been specifically directed to buy drugs from the Appellant. In exchange for their services and their testimony the informants were promised money and/or immunity from prosecution.

As evidence of the conspiracy charged, the Government provided detailed testimony on CODELL GRIFFIN's 1971 conviction for drug possession in its case-in-chief. The Appellant did not take the stand nor did he ever affirmatively put his intent, knowledge, or state of mind "at issue." The Government also introduced testimony that CODELL GRIFFIN had sold drugs in 1967-1969, even though the conspiracy charged in the Indictment was alleged to have begun in September, 1971, and even though there was no proof to connect those activities to either the crimes charged or to any of the other Defendants or alleged conspirators.

Of the six (6) Defendants charged with conspiring with CODELL GRIFFIN in one mass conspiracy, the evidence established that two (2) Defendants, "KENNY" and "MONK," were operating their own conspiracy independent of CODELL GRIFFIN and the others. The only connection between CODELL GRIFFIN and these two (2) Defendants was that he had introduced them to a Government informant as a potential source of drugs. Even so, the Jury was not instructed on multiple conspiracies,

was not informed on how to distinguish between a one mass conspiracy and several but distinct conspiracies and was not directed to acquit those Defendants found to be members of conspiracies other than that charged. The drugs sold by "KENNY" and "MONK" composed most of the hard evidence introduced in the case and those sales resulted in two (2) of Appellant's convictions for drug distribution.

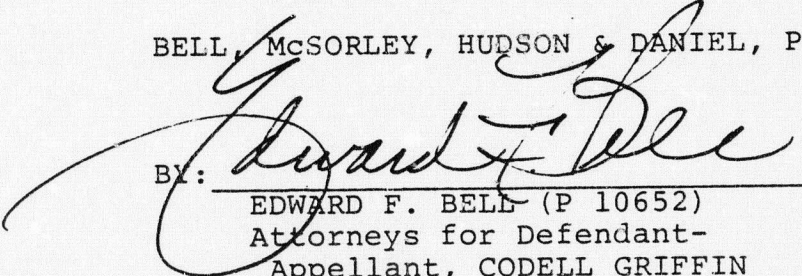
Although CODELL GRIFFIN was not proven beyond a reasonable doubt to have managed or supervised five (5) or more people in a continuing drug enterprise, the Court did not enter a Motion for a Judgment of Acquittal on that Count and allowed the Jury to consider evidence of Appellant's assets and wealth when such evidence was not shown to have derived from drug trafficking and was irrelevant and highly prejudicial to the remaining charges. The Jury was also permitted to consider evidence of the purchases and assets of the Appellant's wife even though they were not shown to have been derived from the Appellant.

The sentence imposed on CODELL GRIFFIN was based on convictions not supported by the evidence as well as upon information presented by the Government that Appellant had no opportunity to rebut. Instead of considering the individual factors of this case when deciding the sentence to be imposed, the Court was guided by sentences handed down by other Courts in unrelated cases and by the deterrence effect the sentence would have on the general community.

For the reasons stated above, it is respectfully submitted that this Court should reverse the convictions of Defendant-Appellant, CODELL GRIFFIN, or in the alternative, remand this cause to the District Court for resentencing.

Respectfully submitted,

BELL, MCSORLEY, HUDSON & DANIEL, P.C.

By: 

EDWARD F. BELL (P 10652)
Attorneys for Defendant-
Appellant, CODELL GRIFFIN
Suite 840 - Buhl Building
Detroit, Michigan 48226
(313) 393-0900

ON THE BRIEF: RONALD A. MOLTER
(P 25463)

Dated: May 19, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 77-1171

CODELL GRIFFIN,

Defendant-Appellant.

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and says:

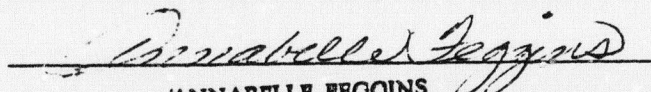
That she is a citizen of the United States and a resident of the County of Wayne, State of Michigan; that her business address is Suite 840 Buhl Building, Detroit, Michigan 48226; that she is over eighteen (18) years of age and not a party to the within action.

That on May 26, 1977, she deposited in the United States mail at Detroit, Michigan, two (2) copies of Appellant GRIFFIN's BRIEF and APPENDIX in envelopes bearing the requisite postage, addressed to:

RONALD GARNETT, ESQ.
U. S. Attorneys Office S.D.N.Y.
U. S. Courthouse Annex
1 St. Andrews Plaza
New York, New York 1007

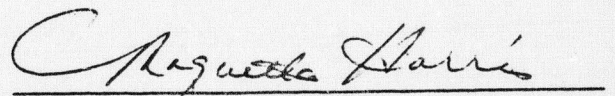
at which places there is delivery service by United States mail from said post office.

Subscribed and sworn to before me
this 26th day of May A.D., 1977.



ANNABELLE FEGQINS
Notary Public, Oakland County, Michigan
My Commission Expires June 30, 1979

(Acting in Wayne County, Michigan)


MAQUETTAS HARRIS



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